SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 578 56

SOUTHERN PACIFIC COMPANY,
Appellant,

vs.

STATE OF ARIZONA, EX REL. JOE CONWAY, ATTORNEY GENERAL OF THE STATE OF ARIZONA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA.

STATEMENT AS TO JURISDICTION.

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No. 878

SOUTHERN PACIFIC COMPANY, A CORPORATION,
Appellant,

vs.

STATE OF ARIZONA, EX REL. JOE CONWAY, ATTORNEY GENERAL OF THE STATE OF ARIZONA,
Appellee.

UPON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA.

APPELLANT'S STATEMENT WITH RESPECT TO JURISDICTION.

I. **The statutory provision believed to sustain jurisdiction** is Section 237(a) of the Judicial Code of the United States (28 United States Code, Section 344(a)).

II. **The statute of the State of Arizona, the validity of which is involved,** is commonly known as the Arizona Train Limit Law. It was enacted in 1912 by the Arizona legislature, and approved by the Governor of that State on May 16, 1912 (Sections 2166-2168, Revised Statutes of

Arizona, 1913; Section 647, Revised Code of Arizona, 1928; now codified and republished as Section 69-119, Arizona Code Annotated, 1939). Said statute, as originally enacted, had no preamble or statement of purpose. Its title and text were as follows:

"*An Act limiting the number of cars in a train.*

"Section 1. It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the State of Arizona, to run, or permit to be run, over his, their, or its line of road, or any portion thereof, any train consisting of more than seventy freight, or other cars, exclusive of caboose.

"Section 2. It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the State of Arizona, to run, or permit to be run, over his, their, or its line of road, or any portion thereof, any passenger train consisting of more than fourteen cars.

"Section 3. Any person, firm, association, company or corporation, operating any railroad in the State of Arizona, who shall willfully violate any of the provisions of this act, shall be liable to the State of Arizona for a penalty of not less than one hundred dollars, nor more than one thousand dolars, for each offense; and such penalty shall be recovered, and suits therefor brought by the attorney general, or under his direction, in the name of the State of Arizona, in any county through which such railroad may be run or operated, provided, however, that this act shall not apply in cases of engine failures between terminals.

"Section 4. All acts and parts of acts in conflict with the provisions of this act are hereby repealed."

When said statute was codified and republished as Section 69-119 of the Arizona Code Annotated, 1939, the section numbers, together with all of Section 4, were omitted, and Sections 1 and 2 were combined into one sentence.

III. **The Judgment sought to be reviewed upon this appeal** was rendered by the Superior Court of the State of Arizona, in and for the County of Pima, on February 5, 1944, in obedience to the mandate of the Supreme Court of Arizona, dated January 14, 1944; which mandate was issued by said Supreme Court, pursuant to its opinion and decision dated December 23, 1943, and its order, dated January 13, 1944, denying the motion for rehearing duly filed in this cause by the above-named appellant, as appellee before said Supreme Court of Arizona.

The application for the allowance of this appeal was presented to the Chief Justice of the Supreme Court of Arizona on the 7th day of March, 1944.

IV. **The nature of this case is as follows:**

The appeal herein is from a final judgment of the Superior Court of Arizona, in and for the County of Pima, rendered and entered by said Superior Court in obedience to the mandate and direction of the Supreme Court of Arizona, following a final decision by said Supreme Court and its denial of a motion for rehearing filed by the present appellant, in a civil action at law theretofore commenced and continued in said Superior Court, in which action the State of Arizona, the present appellee, was the plaintiff, and Southern Pacific Company, the present appellant, was the defendant; the nature of the case and the proceedings had therein being more fully described as follows:

On April 19, 1940, said State of Arizona, as plaintiff, acting by and through its Attorney-General of Arizona, commenced the aforesaid action against the above-named appellant, as defendant, by filing a complaint in the Superior Court of said State, in and for Pima County, seeking to recover from appellant penalties for two alleged violations of the Arizona Train Limit Law, the state statute

set forth in paragraph II of this statement. In due course appellant, as defendant, filed its answer to said complaint. In said answer, after admitting the operation of a freight train of more than 70 cars, exclusive of caboose, and a passenger train of more than 14 cars, within Arizona, as set forth in said complaint, said appellant further alleged, as a matter of affirmative defense, that said Train Limit Law was and is wholly invalid and unconstitutional, as applied to appellant's railroad operations in Arizona and elsewhere, because in violation of the Commerce Clause (Article I, Section 8, Paragraph 3) of the Constitution of the United States, and the Due Process Clause set forth in Section I of the 14th Amendment to the Constitution of the United States, and the corresponding Due Process Clause (Article II, Section 4) of the Constitution of Arizona.

In its answer appellant also alleged in detail the facts upon which its said affirmative defense was predicated, and included therein a prayer for a judgment declaring the Train Limit Law to be invalid and unconstitutional upon each and all of the grounds therein set forth. Reference is hereby made to Part III of said answer, and likewise to the prayer for relief appended to said answer, and particularly to Paragraphs 10, 11, and 12 of said Part III, which embody the specific allegations of unconstitutionality upon which appellant has relied from the outset of this case, and still relies. A copy of said paragraphs 10, 11, and 12 is attached as Appendix A to this statement.

The case duly came on for trial upon the issues as made by the complaint and the answer, before Hon. Levi S. Udall, Judge of the Superior Court of Arizona, sitting without a jury, a trial by jury having been duly waived by the parties. Forty-six court days were required for said trial. An extensive record of oral and documentary testimony was

compiled. Practically all of said testimony was devoted to the development of the facts relevant and material to the issues of constitutionality presented by the pleadings. No other substantive issues were presented to the trial court.

Following the trial and submission of the case, the trial court on February 11, 1942, made and entered its special findings of fact, and its conclusions of law, which findings and conclusions were separately stated, and pursuant thereto, on the same date, rendered and entered its judgment in favor of appellant as defendant, declaring the Arizona Train Limit Law to be invalid and unconstitutional upon each and all of the grounds asserted by appellant in its answer. On said February 11, 1942, the trial court also delivered and filed its memorandum opinion, a complete copy of which is attached to this statement, as Appendix B, wherein it set forth in some detail the reasons for its findings, conclusions, and judgment.

The grounds of said decision and judgment of the trial court are summarized in the judgment as follows:

> "That that certain statute of the State of Arizona, known as the Arizona Train-Limit Law, being Section 69-119 of the Official Arizona Annotated Code, 1939, which statute is set forth in full in the complaint of the plaintiff herein, is unconstitutional and void, because:
>
> "*First:* Said statute invades the exclusive legislative field of Congress, as limited and defined by the Commerce Clause (par. 3, of Sec. 8, Art. 1) of the Constitution of the United States;
>
> "*Second:* Said statute imposes direct, unreasonable and unlawful burdens upon, and interferes with, delays and obstructs interstate commerce, in violation of said Commerce Clause;
>
> "*Third:* Said statute impairs the use and usefulness of the transportation facilities employed by defendant as a common carrier engaged in interstate commerce;

"*Fourth:* Said statute is in conflict with and infringes upon, and amounts to an unlawful attempt to supplement, the power-brake provisions of the Federal Safety Appliance Acts, and the safety-device provisions of Section 25 of the Interstate Commerce Act, which Federal statutes operate upon the same subject matter and are directed to the same objects as said Train-Limit Law and by which said statutes Congress has completely and exclusively occupied the field of regulation of train lengths;

"*Fifth:* Said statute operates unreasonably and arbitrarily to deprive defendant of its property, without due process of law, in violation of both the Due-Process Clause of the Fourteenth Amendment to the Constitution of the United States, and the Due-Process Clause set forth in Section 4 of Article 2 of the Constitution of the State of Arizona;"

On April 9, 1942, the State of Arizona took an appeal from said judgment of the trial court to the Supreme Court of Arizona. Said Supreme Court of Arizona is the court created by the Constitution of said State, for the purpose, among others, of hearing and deciding appeals from the superior courts of said State, and is the highest court and the only court of said State of Arizona having jurisdiction to hear, determine, and finally decide such appeals, and is the highest court of said State in which a decision of this suit could be had. No other court of said State has any power, under the Constitution and statutes of Arizona, to review, reverse, or modify a decision or judgment rendered by said Supreme Court of Arizona.

Reference is hereby made to Article 6, Section 1, of the Constitution of Arizona, which vests the judicial power of the State in the Supreme Court, the superior courts, and such other courts as may be provided by law; to Section 4 of the same article of said Constitution, which defines the jurisdiction of said Supreme Court, and particularly de-

clares that it shall have appellate jurisdiction in all actions and proceedings; and to Section 21-1702 of the Arizona Code Annotated, 1939, which provides for the review by said Supreme Court of judgments entered by the superior courts of the State.

Following the submission of this case to said Supreme Court of Arizona, upon the above-mentioned appeal, said Court on December 23, 1943, announced and entered its opinion and decision, which was concurred in by two of the three judges comprising said Court, wherein and whereby it reversed the judgment of the trial court dated February 11, 1942. In and by its said opinion and decision, said Supreme Court of Arizona held and declared, as the sole grounds of its decision, that said Arizona Train Limit Law is valid and constitutional, and that the judgment of the trial court to the effect that said Train Limit Law is unconstitutional was in error. A full and complete copy of said opinion is attached to this statement as Appendix C.

On January 7, 1944, the above named appellant (as appellee before said Supreme Court of Arizona) duly filed with said Court a motion for rehearing of the case. Said motion for rehearing was denied by said Court on January 13, 1944; and upon January 14, 1944, said Court issued its mandate to the trial court, ordering and directing further proceedings to be had in the cause in conformity with its decision and opinion of December 23, 1943. A copy of said mandate is included in the record on appeal, and a copy is also attached to this statement as Appendix D.

On said January 13, 1944, there was also rendered and filed the separate dissenting opinion of Honorable Henry D. Ross, one of the members of said Court. A copy of said dissenting opinion is attached to this statement as Appendix E.

On February 5, 1944, the trial court rendered and entered final judgment in this cause, in obedience to the afore-

said mandate and direction of the Supreme Court of Arizona, in favor of the original plaintiff, the State of Arizona, and against the present appellant as the original defendant. In said judgment of February 5, 1944, said trial court declared that the Arizona Train Limit Law is valid and constitutional, and imposed upon appellant a penalty of $250.00 for each of the two violations of said Train Limit Law described in the original complaint, or a total penalty of $500.00. A copy of said judgment dated February 5, 1944, is attached to this statement as Appendix F.

The cause is now brought to this Court, by direct appeal from the final decision of the Supreme Court of Arizona, as rendered on December 23, 1943, and the final judgment of the trial court entered on February 5, 1944, in obedience to said decision and mandate of the Supreme Court of Arizona.

V. **The grounds upon which it is contended that the federal questions involved are substantial** are as follows:

(A) The invalidity, on the ground of violation of the Federal Constitution by the State statute (the Arizona Train Limit Law) upon which the suit is based, has been and is the principal ground of defense presented, urged, and relied upon by appellant.

(B) Such invalidity of the Train Limit Law has been asserted, as the essential basis of said defense, from the outset of the case (namely, in the answer originally filed) and continuously throughout the trial and upon the subsequent appeal to the Supreme Court of Arizona.

(C) In support of its said defense of invalidity, appellant as defendant adduced the testimony of some 60 witnesses, and offered in evidence 316 exhibits, 311 of which were received. Appellee, as plaintiff adduced the testimony of 13 witnesses, and offered in evidence 86 exhibits, 68 of which were received. Substantially all of appellee's evidence was likewise addressed to the basic issue of invalidity.

(D) The trial court found and held that said defense of invalidity of said statute, under the Constitution of the United States, was sustained by the evidence and the law, including the decisions of the Supreme Court of the United States, and on February 11, 1942, rendered judgment for appellant accordingly. As previously stated, one of the three judges comprising the Supreme Court of Arizona agreed with said decision and judgment of the trial court, and upon appeal voted for its affirmance.

(E) There are no decisions of this Court which directly declare that a State statute limiting the lengths of trains operated by railroad common carriers in interstate commerce to a fixed maximum number of cars per train is valid under the Constitution and laws of the United States, or which are otherwise so clearly or directly in point upon the issues arising under the Constitution of the United States, presented in this case and upon this appeal, as to foreclose any further debate upon or discussion of said issues.

There are, on the contrary, many decisions of this Court which sustain appellant's position upon each and all of said issues under the Constitution of the United States: in that this Court has held and decided that State statutes or regulations having effects and results not distinguishable from those flowing from appellant's enforced compliance with the Arizona Train Limit Law were and are unconstitutional and void, because in violation of the Commerce Clause of, or the Due Process Clause of the 14th Amendment to, the Constitution of the United States: the same constitutional provisions upon which appellant relies in the present case:

(1) In particular, this Court has many times held and decided that a state statute cannot be sustained as valid, under said Commerce Clause, if it undertakes (as does the Arizona Train Limit Law) to regulate a subject matter, such as the lengths of railroad trains operating in continuous movement in interstate commerce, which requires

a general or national system and uniformity of regulation, if such regulation should for any reason be required—because such subject is not within the field of regulation permitted to the states, but instead belongs to and falls within the field of regulation exclusively vested in and reserved to Congress under said Commerce Clause:

Hall v. *DeCuir* (1877), 95 U. S. 485;
Minnesota Rate Cases (1912), 230 U. S. 352, 399-400;
Kelly v. *Washington* (1937), 302 U. S. 1, 9, 14-15;
Milk Control Board v. *Eisenberg Farm Products* (1939), 306 U. S. 346, 351;
Edwards v. *California* (1941), 314 U. S. 160, 174, 176.

Compare:

Parker v. *Brown* (1942), 317 U. S. 341, 362-363.

(2) This Court has likewise held that a state cannot validly enact a statute which, by necessary and inevitable effect, substantially and directly regulates (as the Arizona Train Limit Law admittedly does) the conduct of interstate commerce extra-territorially, that is to say, in other states:

Hall v. *DeCuir* (1877), 95 U. S. 485, 488;
Bowman v. *C. & N. W. Ry. Co.* (1888), 125 U. S. 465, 486;
South Covington R. Co. v. *Covington* (1915), 235 U. S. 537, 547-548.

Compare:

Olmsted v. *Olmsted* (1910), 216 U. S. 386, 395;
Home Insurance Co. v. *Dick* (1930), 281 U. S. 397, 410;
Baldwin v. *Seelig* (1935), 294 U. S. 511, 521;
Magnolia Petroleum Co. v. *Hunt* (Dec. 20, 1943), October Term, 1943, No. 29.

(3) This Court has likewise held and decided that a state law or regulation which, even though claimed to have

been enacted in the interest of public safety or convenience or some other object associated with the police power of the state, in fact directly, substantially, and unreasonably obstructs, burdens, and interferes with interstate commerce (as does the Arizona Train Limit Law), is in violation of the Commerce Clause, and therefore invalid.

Kansas City S. R. Co. v. *Kaw Valley District* (1914), 233 U. S. 75, 79;

Seaboard Airline R. Co. v. *Blackwell* (1917), 244 U. S. 310;

M-K & T. R. Co. v. *Texas* (1918), 245 U. S. 484, 488;

St. Louis-San Francisco R. Co. v. *Railroad Commission* (1921), 254 U. S. 535, 537;

La Coste v. *Dept. of Conservation* (1924), 263 U. S. 545, 550;

Foster-Fountain Packing Co. v. *Haydel* (1929) 278 U. S. 1;

Compare:

Minnesota Rate Cases (1912), 230 U. S. 352, 400;

Milk Control Board v. *Eisenberg Farm Products* (1939), 306 U. S. 346, 351;

Edwards v. *California* (1941), 314 U. S. 160, 174, 176.

(4) This Court has further held and decided that when Congress has undertaken to regulate with respect to a particular phase or subject matter of interstate commerce, any state statute purporting to regulate the same subject matter, whether already existing or thereafter enacted, forthwith becomes void and of no effect, because the states are powerless either to annul, augment, or supplement the congressional regulation.

Erie R. Co. v. *New York* (1914), 233 U. S. 671;

New York Central R. Co. v. *Winfield* (1917), 244 U. S. 147;

Pa. R. Co. v. *Public Service Commission* (1919), 250 U. S. 566, 569;

Napier v. *Atlantic Coast Line R. Co.* (1926), 272 U. S. 605, 612;

Chesapeake & Ohio R. Co. v. *Stapleton* (1929), 279 U. S. 587, 592;

Kelly v. *Washington* (1937), 302 U. S. 1, 10-13;

Welch Co. v. *New Hampshire* (1939), 306 U. S. 79, 85.

The challenged Train Limit Law is claimed by the appellee to be necessary as a safety measure, because trains longer than permitted by the law (70 freight, or 14 passenger cars) assertedly cannot be safely controlled while in motion or stopped by the use of the present types of air brakes. The Federal Safety Appliance Act (45 U. S. Code, Sections 1, 9), and the Safety Section of Part I of the Interstate Commerce Act (49 U. S. Code, Part I, Section 25), require that trains of interstate railroads be equipped with air brakes, adequate to control and stop them safely, and that trains longer than can be thus controlled shall not be run. The Interstate Commerce Commission has issued its own regulations covering the subject matter, acting pursuant to the authority conferred by Congress. Compare:

Virginian Railway Co. v. *U. S.* (1915), 233 Fed. 748;

U. S. v. *Great Northern R. Co.* (1916), 229 Fed. 927;

Pa. R. Co. v. *U. S.* (1917), 241 Fed. 824;

New York Central R. Co. v. *U. S.* (1924), 265 U. S. 41, 46.

The Federal Safety Appliance Act has been declared by this Court to have been enacted in order to promote safety of railroad operation.

Johnson v. *Southern Pac. Co.* (1904), 196 U. S. 1, 17;

New York Central R. Co. v. *U. S.* (1924), 265 U. S. 41, 45-46;

Tipton v. *A. T. & S. F. Ry. Co.* (1935), 78 Fed. (2d) 450; (1936), 298 U. S. 141;
U. S. v. *California* (1936), 297 U. S. 175.

(5) This Court has further held and declared that a state law or regulation, although purporting to have been enacted under the police power, must be held invalid, in violation of the Due Process Clause of the 14th Amendment to the Constitution of the United States, if it is shown that said law bears no reasonable relation to its claimed or purported object, but instead is arbitrary and capricious, and the cost of obedience, when considered with other factors of the case, is wholly out of proportion to any possible benefits.

Mugler v. *Kansas* (1887), 123 U. S. 623, 661;
Minnesota v. *Barber* (1890), 136 U. S. 313, 319;
Norfolk & Western R. Co. v. *Public Service Commission* (1924), 265 U. S. 70, 74;
Liggett v. *Baldridge* (1928), 278 U. S. 105;
Lehigh Valley R. Co. v. *Commissioners* (1928), 278 U. S. 24, 33;
A. T. & S. F. R. Co. v. *Railroad Commission* (1931), 283 U. S. 380, 395-396;
Southern Ry. Co. v. *Virginia* (1933), 290 U. S. 190;
Nebbia v. *New York* (1934), 291 U. S. 502, 525;
N. C. & St. L. R. Co. v. *Walters* (1935), 294 U. S. 405.

The trial court's findings demonstrate that the challenged law does not in fact promote safety of railroad train operation, because it does not remove or measurably reduce any hazard associated with such operation, but on the contrary increases certain of the hazards attendant upon such operation, and creates certain other hazards which would not otherwise exist; that it necessarily and inevitably imposes upon appellant, as a result of enforced compliance with its provisions, a great and wholly uncompensated burden of

expense and interference. These findings are based upon evidence received at the trial, the truth and competence of which was not challenged by appellee.

(F) The great weight of authority in the inferior federal courts, in cases where the same or substantially similar state regulations have been assailed as invalid under the Constitution of the United States, directly upholds the contentions of appellant with respect to the Arizona Train Limit Law.

Thus, in

A. T. & S. F. Ry. Co. v. *La Prade* (1933), 2 Fed. Supp. 855, a special three-judge court for the District of Arizona, in suits brought to enjoin the enforcement of the Arizona Train Limit Law, unanimously held said law to be invalid and unconstitutional, upon the precise federal grounds now urged by appellant herein.

The conclusions expressed in that opinion were given no effect, solely because of the holding of this Court (*Ex Parte La Prade* (1933), 289 U. S. 444) that the suit in the district court had abated because of the substitution of the incoming attorney general for the original defendant. No question was presented to or passed upon by this Court, other than the propriety of said substitution.

In *Southern Pacific Co.* v. *Mashburn* (1937), 18 Fed. Supp. 393, a special three-judge Court for the District of Nevada also unanimously held invalid the Nevada Train Limit Law, enacted in 1935, which prohibits the operation in that state of railroad trains of more than 70 cars, exclusive of caboose; again upon precisely the same federal grounds now urged by appellant in the present suit. A permanent injunction was issued accordingly.

A special three-judge court for the Eastern District of Louisiana also unanimously held invalid the Louisiana Train Limit Law, enacted in 1936, prohibiting the operation

of freight trains of more than 70 cars, exclusive of caboose, and passenger trains of more than 16 cars. The case is unreported, but identified upon the records of that court as:

Texas & New Orleans R. Co. v. *Martin, et al.* (1936), No. 428-Equity.

In *M-K-T Ry. Co.* v. *Williamson* (1941), 363 Fed. Supp. 607, a special three-judge court for the District of Oklahoma, with one member dissenting, held the Oklahoma Train Limit Law, enacted in 1937 (which forbids the operation of trains of more than 70 cars), to be valid, against an attack based upon the same grounds urged in the instant case; except that the opinion of that court indicates that it was not contended in the suit that the law should be held invalid because of extra-territorial effect: a point which is here strongly relied upon.

In *Southern Pacific Co.* v. *Railroad Commission of California* (1935), 10 Fed. Supp. 918, a special three-judge court for the Northern District of California held invalid, under the Commerce Clause, and the Due Process Clause of the 14th Amendment, an order of the Railroad Commission of California requiring the plaintiff company to place an additional caboose on each of its freight trains of more than 57 cars operating over its main line between Roseville, California, and the California-Nevada boundary, during the six winter months. The grounds of decision were substantially identical with the grounds of invalidity of the Arizona Train Limit Law here urged; and the court referred with approval to the decision of the special court for the District of Arizona in *A. T. & S. F. Ry. Co.* v. *La Prade*, 2 Fed. Supp. 855.

No appeal was ever taken from the decisions of the several district courts in the cases referred to in this paragraph; and except for the decision of the District Court for Arizona involving the Arizona Train Limit Law, each of

said decisions became final and has ever since been observed.

Summarizing, there have been four cases in the federal district courts involving the validity of state train limit laws, heard before twelve different federal, circuit, and district judges. Ten of said judges have taken the view that state train limit laws, exactly or essentially similar to the Arizona law, are invalid upon precisely the same constitutional grounds urged in the present case. Only two of the twelve judges have taken the contrary view.

(G) The opinion and decision of the Supreme Court of Arizona show that that Court intended to determine, and necessarily determined, the issues in this case which arise under the Constitution of the United States, as well as those arising under the Constitution and laws of Arizona; and further show that the decision does not rest upon an independent state ground adequate to support it.

The trial court's judgment clearly and distinctly held the Train Limit Law invalid, not only under the State Constitution, but also under the Federal Constitution and statutes: the several grounds of invalidity are separately set forth therein. The Supreme Court of Arizona recognized that the trial court's judgment was predicated upon these several grounds, for in the opinion (p. 2) it quoted from the text of that judgment; and thereafter it concluded its opinion by declaring (p. 14) "that the findings and judgment of the trial court to the effect that the Train Limit Law is unconstitutional were in error," and reversed said judgment.

That reversal operated to overturn the trial court's judgment in its entirety; that is to say, the trial court's conclusions upon the issues under the Federal Constitution, as well as under the state constitution, were reversed and set aside. If the reversal had been restricted to the state issue only, with intent not to pass upon the federal issues, the

trial court's conclusions (as expressed in its judgment) that the challenged law is invalid under the Federal Constitution would not have been affected; so that the judgment, to the extent that it constituted a decision of the federal issues, would have remained unimpaired, and the challenged law would have continued to stand adjudged to be invalid. The only way in which the Supreme Court of Arizona could have reversed the trial court's judgment without qualification (as it did) was by holding that that judgment was erroneous in its disposition of the federal issues, as well as the state issue. If the state issue only had been decided, then the conclusion that "the judgment is reversed," set forth in the last sentence of the opinion, would have had no adequate support; it becomes a complete and effective reversal of the trial court's judgment because, and *only* because, it is supported by the court's determination of the federal issues.

The scope of the decision, and the Court's intentions in this behalf, are also shown by its reference to and quotation from the majority opinion in the *Oklahoma Train-Limit Case: M-K-T Ry. Co.* v. *Williamson*, 36 Fed. Supp. 607. These quotations (pp. 10-12 of the opinion) set forth the conclusions of the special district court for Oklahoma, upon the various grounds of attack under the Federal Constitution directed against the Oklahoma Train-Limit Law. Except that the question of extra-territorial effect was not there involved, these are largely the same grounds as urged in the instant case, and are exclusively federal in character.

It is submitted that the decision of the Supreme Court of Arizona constituted a determination of issues arising under the Federal Constitution, which determination was necessary to the decision, and that said decision does not rest upon an independent state ground adequate to support it irrespective of said federal grounds of decision.

VI. *The following decisions of this Court are believed to sustain the jurisdiction of the Court in the premises:*

C. B. & Q. R. R. Co. v. *Drainage Commissioners* (1906), 200 U. S. 561, 580-581;
West Chicago Street Ry. Co. v. *Chicago* (1906), 201 U. S. 506, 519-520;
Second Natl. Bank v. *First Natl. Bank* (1917), 243 U. S. 600;
Whitney v. *California* (1927), 274 U. S. 357, 360-361;
Bryant v. *Zimmerman* (1928), 278 U. S. 63, 68;
Milheim v. *Moffat Tunnel Dist.* (1923), 262 U. S. 710, 716;
Abie State Bank v. *Bryan* (1931), 282 U. S. 765, 773;
Senn v. *Tile Layers Union* (1937), 301 U. S. 468, 476;
Cheseboro v. *Los Angeles County Dist.* (1939), 306 U. S. 459, 462-463;
Tulee v. *Washington* (1942), 315 U. S. 681, 682;
Standard Oil Co. v. *Johnson* (1942), 316 U. S. 481, 483;
Largent v. *Texas* (1943), 318 U. S. 418, 421.

Dated March 7th, 1944.

Respectfully submitted,

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APPENDIX A.

Paragraphs 10, 11 and 12, of Part 3 of Defendant's Answer in State of Arizona, Etc., Plaintiff, v. Southern Pacific Company, Defendant. Superior Court of Arizona, Pima County, No. 20087.

"10. *The Train-Limit Law violates the Commerce Clause of the Federal Constitution.*

Said Train-Limit Law is unconstitutional and void, as to each and all of the interstate trains of the defendant, in that it conflicts with and violates the Commerce Clause (Paragraph 3 of Section 8, Article I) of the Constitution of the United States; because:

(a) The permissible number of cars in an interstate railroad train passing from one state to another, or passing from one state through another into a third, or passing through a number of states, is a subject over which exclusive legislative jurisdiction was and is vested in Congress by said Commerce Clause;

(b) The necessary effect of said law is: (1) to impose a direct and substantial burden upon, and directly and substantially to interfere with, delay, and regulate, the operation of defendant's interstate freight and passenger trains across and within Arizona, as well as in California and New Mexico; (2) to determine the number of interstate trains to be run by defendant, not only within Arizona, but also within adjoining portions of California and New Mexico; and (3) to impair the usefulness of the facilities used, as well as those usuable, by the defendant in the carriage of interstate commerce across, through, into, and out of, the State of Arizona.

11. *The Train-Limit Law violates the Due-Process Clauses of the Fourteenth Amendment to the Federal Constitution and Article II, Section 4, of the State Constitution.*

Said Train-Limit Law is further unconstitutional and void, and in violation of the aforesaid Commerce Clause

of the Constitution, and also operates unreasonably and arbitrarily to deprive defendant of its property without due process of law, in violation of the Due-Process Clause of the Fourteenth Amendment to the Constitution of the United States, and the Due-Process Clause set forth in Section 4 of Article II of the Constitution of the State of Arizona, because:

(a) It fixes maximum train lengths very much lower than those which generally obtain elsewhere throughout the United States, under operating conditions substantially the same as those on defendant's main lines in Arizona;

(b) It makes no allowance for grade or other operating conditions, or for the construction, type, weight, or length of the cars composing the train, or whether such trains are loaded or empty, and if loaded the weight of the load;

(c) It imposes a great and substantial burden of expense upon, interference with, and delay to, interstate commerce and impairs the usefulness of defendant's transportation facilities; and

(d) It bears no reasonable relation to health or safety.

12. *The Train-Limit Law conflicts with Federal Legislation.*

Said Train-Limit Law is further void, invalid, and unenforceable, for the reason that it is in conflict with, and/or an infringement upon, legislation heretofore enacted by Congress, pursuant to its powers under the Commerce Clause of the Constitution, in the following respects:

(a) To the extent that said Train-Limit Law is or may be intended to prevent the use of heavy locomotives in the State of Arizona, and thus to regulate locomotive sizes, it is an infringement upon and in conflict with statutes enacted by Congress pursuant thereto, having the same or a like purpose, to wit, the Boiler Inspection Act of February 17, 1911 (36 Stat. 913), as amended in 1913, (38 Stat. 1192) and in 1924 (43 Stat. 659), being Sections 23 to 35, inclusive, of Title 45 of the United States Code,

wherein and whereby full power over the size, design, weight or construction of locomotives was delegated to and is now vested in the Interstate Commerce Commission;

(b) To the extent to which said Train-Limit Law is intended to or has or may have the effect of limiting the number of cars in a freight or passenger train to the maximum number which properly and with reasonable safety can be controlled in one train by the type of air brakes and their appurtenances now used on such trains, or by any other form of train-control devices or other safety devices, it is void, in that it attempts to and does enter a legislative field already entered and therefore completely occupied by Congress; the Congress having, under the Commerce Clause, by the enactment of the power-brake provisions of the Safety Appliance Act, as amended (Sections 1 and 9 of Chapter 1 of Title 45 of the United States Code), and the provisions of Section 26 of the Interstate Commerce Act (Section 26 of Chapter 1 of Title 49, of the United States Code), delegated to the Interstate Commerce Commission full and complete authority to investigate and determine the adequacy of the air-brakes, and their appurtenances, and other forms of train-control and other safety devices, used or proposed to be used upon locomotives and cars operated in interstate commerce, and by order to prescribe the form and type of such air-brakes, appurtenances and other train-control and safety devices, and from time to time to issue such amendatory and supplementary orders as it may deem necessary or desirable in the exercise of the power and jurisdiction thus conferred by Congress; and the Congress having, in particular, in and by said statutes, necessarily empowered said Interstate Commerce Commission to determine whether the types of air-brakes, and their appurtenances, presently used or proposed to be used upon trains in interstate commerce, are or will be adequate and effective, safely and properly to control and to stop trains of the lengths now being operated in interstate commerce, both in the State of Arizona and elsewhere, by the defendant and by other railroad common carriers throughout the United States."

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APPENDIX B.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA

No. 20087.

STATE OF ARIZONA, ex rel., Joe Conway, Attorney General of the State of Arizona, *Plaintiff*,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, *Defendant*.

Memorandum Opinion.

This suit, brought by the State of Arizona at the relation of the Attorney General, is a civil action, seeking to recover from the defendant railroad company, which is an interstate carrier, penalties for violations of what is known as the Arizona Train-Limit Law. The complaint contains two causes of action; one charges the operation on March 2, 1940, of a passenger train containing sixteen cars; and the other alleges that on April 4, 1940, a freight train containing ninety-one cars was unlawfully operated. Both trains were operated west out of the Tucson yards. The defendant frankly admitted the operations complained of, but sought to avoid the penalties by asserting that the law in question was and is invalid and unconstitutional as applied to its interstate trains and traffic, because in conflict with various provisions of the State and Federal constitutions, which sections are hereinafter more particularly referred to.

The trial of these issues commenced November 19, 1940, and closed May 1, 1941, there being a number of intervening recesses; in all forty-six court days out of thirteen different weeks were consumed in the trial. Seventy-three different witnesses testified, many of whom came from all parts of the United States, and some 402 exhibits were offered in evidence.

The law under attack was enacted by the Legislature of the State of Arizona and approved by the Governor on May 16, 1912. A referendum was invoked and at a general State election, held November 5, 1912, the law was approved by a

majority of the voters. It now appears as Section 69-119, Arizona Code Annotated, 1939. Since its adoption in 1912 this law, with but few exceptions and over short periods, has been enforced by the State and its terms complied with by the defendant. A notable exception is that by sufferance of the State the operations from the California-Arizona line into the Yuma yards has never been treated as within the purview of the law.

Briefly, the law provides that it shall be unlawful for a freight train consisting of more than seventy cars, exclusive of caboose, or a passenger train containing more than fourteen cars to be operated in the State of Arizona, and it provides a penalty of not less than $100.00, nor more than $1,000.00 for each violation thereof. The law when passed was entitled, "An Act Limiting the Number of Cars in a Train", without any preamble reciting its basic purpose. This Court will assume, for the purpose of determining this matter, that the law was enacted under the inherent police power of the State to promote and provide greater safety of persons and property, for it is fundamental that the State can only interfere in matters affecting interstate commerce where the health, safety or welfare of its citizens may so require, and then only when the law is reasonably adapted to accomplish the end sought to be attained.

The sole question, then, before the Court is as to the constitutionality of the Arizona Train-Limit Law as applied to defendant's interstate operations under the conditions as they have been shown to exist during the period covered by the record in this case. For, even though the law may have been constitutional when enacted in 1912, it does not prevent the Court from a re-examination to determine whether conditions may have changed so as to render it arbitrary and unreasonable, considered in the light of the changes. This record discloses that the present conditions, upon which the plaintiff must rely, are vastly and fundamentally different from those existing when the law was passed. Both the rolling equipment and the fixed plant have been practically completely changed, this through the medium of extensive improvement and reconstruction. Operating methods have been substantially modified. The volume and character of the traffic are quite different from that which

was carried in 1912. As a matter of fact, the law had no appreciable adverse effect on defendant's operations when enacted, for the reason that freight trains then averaged but forty-seven cars and only 0.38% of the trains had more than seventy cars. Passenger trains only averaged nine or ten cars. By September of 1913 the entire Southern Pacific System in Arizona had only some two miles of its track protected by block signals.

In determining the constitutional questions raised in this case I have constantly kept in mind the admonition of the present Chief Justice of the United States, wherein he said: "The power of courts to declare a statute unconstitutional is subject to a guiding principle of decision which ought never to be absent from judicial consciousness. This is that the Courts are concerned only *with the power to enact statutes, not with their wisdom.* For the removal of unwise laws from the statute books appeal lies not only to the courts but to the ballot and to the processes of democratic government."

There can be no question but what the presumption is in favor of every legislative act, and the whole burden of proof lies on him who denies the constitutionality. The defendant here has been required to assume that full burden. The constitutional invalidity must be manifest and if it rests upon disputed questions of fact, the invalidating facts must be proved.

Here there is being called in question the validity of a statute which has been upon our books for more than twenty-eight years. It was not only passed by the Legislature, but subsequently approved by the people themselves in a referendum. More recently the Fifteenth Legislature made a special appropriation of a substantial amount to defend and sustain this law. This Court fully appreciates the delicacy of the situation and the great responsibility of rendering a judgment thereon. It is sometimes said that the court assumes a power to overrule or control the action of the people, or their representatives. This is a misconception. Our constitutions are the supreme laws of the land ordained and established by the people. All legislation must conform to the principles they lay down. When an act of a State Legislature is appropriately challenged in the

courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty—to lay the article or articles of the constitution which are invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.

For some five and a half months I listened to the evidence adduced from the witness stand. In the intervening months, to refresh my memory, I have read the eighteen volumes comprising the Reporter's Transcript, which contains more than a million words; the numerous exhibits have been re-examined, the comprehensive briefs submitted by counsel for both parties, the last of which reached me on December 20, 1941, have been carefully studied and the hundreds of cases therein cited examined and it is now my matured conclusion that the Arizona Train-Limit Law is unconstitutional and void and I would be unworthy of the position that I hold if I did not have the courage to so declare it, irrespective of the effect of the ruling upon the parties, or those heretofore benefited thereby.

It should be remembered that this case is unique in at least two respects: It is the first train limit case to reach the State courts; second, it is the first time in the United States that the evidence in such a case has been taken before a trial judge. There are only four cases that are squarely in point, they are: The first Arizona case, the Nevada case, the Oklahoma case, and the Louisiana case. In the latter case no opinion was filed and, hence, it does not appear as a reported case. All of the four cases were brought in the Federal Court and determined by a special three-judge court. The evidence was either taken by a special master or the matter submitted on affidavits as in the Oklahoma and Louisiana cases. Admittedly none of the decisions in the four cases above referred to are controlling upon this Court. The Oklahoma law was sustained by a divided Court, while

the courts in the other three cases declared the law under attack as unconstitutional. The first Arizona case was appealed to the Supreme Court of the United States and reversed on a jurisdictional ground without passing upon the merits. However, the opinions are of value in their logic and reasoning in passing upon identical questions as those here presented.

As a brief review of this type of legislation, the testimony of Dr. Parmelee, who is the Director of the Bureau of Railway Economics of the Association of American Railroads, shows that though forty-four different bills attempting to regulate the length of trains have been introduced in thirty-five different states, it was only in Arizona (1912), Nevada (1935), Louisiana (1936) and Oklahoma (1937) that such laws were actually passed. Three such measures were defeated in Congress. Only Arizona and more recently Oklahoma have actually operated under such laws. The Nevada and Oklahoma statutes affected only the length of freight trains, no mention being made of passenger-train operations.

As a part of its comparative showing as to costs and methods of operation, casualties, etc., the defendant presented the National picture of railroading by witnesses, who are outstanding in their respective fields, from sixteen of the Class I roads of the United States. The railroads from which these witnesses came perform fifty-nine per cent of the freight service, sixty per cent of the passenger service, and operate fifty-four per cent of the Class I railroad mileage of America. This evidence clearly establishes that "long-train" operating practice is the customary and ordinary practice throughout the United States and that improvements in efficiency, economy and safety are an accomplishment and necessary result of the adoption of that practice. This type of operation is unquestionably more economical and efficient than "short-train" operations. Freight train expenses vary inversely with train length. Furthermore, long-train operations permit improved schedules and performance by elimination of short-train interference. Operating conditions, including grades and curves on defendant's lines, in Arizona were not shown to be essentially different from those in other parts of the

United States. As a matter of fact, eighty-four per cent of defendant's main lines in Arizona are tangent (straight) track, and of the sixteen per cent that is curved only one per cent has curves of more than six degrees. Between March 2d and April 30th, 1940, the defendant's operations were carried on without regard to the restrictions of the train-limit law, during which period some sixty-two long passenger trains and some 302 long freight trains were operated without particular incident. This further indicates that long-train operations can be successfully carried out over the Arizona lines.

I shall not attempt in this opinion, as no good purpose could be served thereby, to make an analysis of the evidence, as that will be covered by the findings of fact filed this day. Nor shall I attempt to review and differentiate the numerous cited cases which lay down the principles of law governing these matters. I shall content myself with stating some of the principal reasons leading to the conclusion announced.

There is a field of regulation of interstate activities which, under the commerce clause, is exclusively reserved to the National Government, and I am firmly convinced that the subject of the length of trains engaged in interstate traffic falls within that class. This for the reason that the subject matter is national in its character, requiring uniformity of regulation by a single authority. If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. The very purpose of the commerce clause was to insure uniformity of regulation of interstate commerce against conflicting and discriminating state legislation, such as the law in question. The absence of any act of Congress on the subject of train lengths is equal to its declaration that commerce in that matter shall be free. In other words, the inertia of government should be on the side of freedom of commerce, rather than on the side of restraint of commerce. The determination of this entire case might well be decided upon this exclusive federal field doctrine, which is in effect saying that Arizona never had the right to pass this legislation in the first instance.

There is a second so-called "joint" field of regulation, relating to those matters which require diversity of treatment according to local conditions, where the states may act within their respective jurisdictions, unless and until Congress sees fit to exercise its paramount authority. But even if the law in question were found not to fall in the "exclusive Federal field," but rather in the "joint field" of regulation, still the law must be stricken down for the reason that in my opinion Congress has, by the enactment of the Safety Appliance Act, Boiler Inspection Act, etc., coupled with the broad powers delegated to the Interstate Commerce Commission, fully "occupied" this joint field of regulation. This would automatically oust the State of any power to supplement or expand such regulations any more than it could annul or amend them. Clearly if the law is necessary as a safety measure because "long trains" cannot be properly controlled and stopped with the present types of air brakes, then it gets over into a field already occupied by the Congress through the passage of the safety acts above referred to. Engineer Thrace Cooper of the Santa Fe System called by the State testified: "Your ability to control slack in a train rests solely on your ability to apply and release the brakes throughout the train."

There is still another infirmity to overcome: Any laws enacted by the State in the concurrent field must not be unreasonable or arbitrary and must not *substantially or directly* regulate, obstruct, impede or burden interstate commerce, *incidental or indirect interference* being all that is permitted.

The heavy direct burden cast by the law upon interstate commerce can not be seriously questioned and the impairment of the efficient use of defendant's property is of itself an unlawful taking of that property without due process of law, which is a violation of both the State and Federal constitutions. The fact that it costs the defendant in excess of $300,000.00 a year to comply with this law would not of itself, standing alone, warrant invalidating the law, providing it was otherwise valid and bore some reasonable relation to the purpose for which it was enacted. The cost of compliance, however, with a statute of this kind is an element for appropriate consideration in determining whether

the statute is arbitrary, capricious or repugnant to due process, and this factor has been so considered in arriving at a decision in this case.

The record here also amply discloses that the law causes real interference with, and delay to, interstate commerce, practically to the extent that Arizona operations create a bottle-neck. Actually ninety-three per cent of the freight traffic and ninety-five of the passenger business of the defendant in Arizona is interstate commerce. Furthermore, the law certainly imposes a great, substantial and wholly unreasonable burden of expense upon this interstate traffic. To hold in this case that interstate commerce was only incidentally or indirectly involved would be less than realistic, for the interference and regulation is *substantial, continuous, direct and unavoidable*, as is pointed out in detail in the findings of fact. What is even more serious from the standpoint of those who seek to uphold the Act is its extra-territorial effect. The challenged law lays hands upon interstate commerce moving over defendant's lines long before it reaches the physical boundaries of Arizona, and continues directly to affect and regulate that commerce long after it has left Arizona. As a practical matter, it nearly controls the length of passenger trains from Los Angeles to El Paso, and of freight trains from Yuma to Lordsburg, the latter point being twenty-three miles East of the State line, and frequently on to El Paso, 171 miles beyond Arizona's boundary. Under the decided cases it is fatal for any police power statute to operate with extra-territorial effect, and under the guise of the police power no state may thus directly interfere with interstate commerce.

Even if the proponents of the law were able to clear all of the other hurdles heretofore discussed, there would then arise the hotly contested question as to whether this train-limit-law actually bears any reasonable relation to safety. The Statute was unquestionably enacted under the police power, which is that undefined branch of government which bears the same relation to the State that the principle of self defense bears to the individual. Police power is founded upon public necessity and only public necessity can justify its exercise. If the law in question

does not promote the safety of employees and travelers upon the defendant's railroad lines, and others who are affected by said operations, then it must fall.

There need be no speculation as to the effect of the law (as would be the case if this were a recently enacted statute whose prospective effect might be problematical) for the reason that the Interstate Commerce Commission, by its regulations, and the Congress by legislative enactment, have required this defendant and all other railroads to file detailed monthly reports of accidents and casualties occurring in connection with their operations. Furthermore, all of the more serious accidents are investigated by a representative of the Commission.

The defendant established the fact that operating conditions on its lines across the Salt Lake Division, through the State of Nevada, where "long-train operations" are the rule, are entirely comparable in practically every respect to the operations on the Tucson division, in the State of Arizona. These latter operations being restricted by the law in question.

Detailed exhibits as to accidents and casualties of all types and classes were introduced in evidence. These exhibits covered operations particularly in Nevada and Arizona, as well as showing the National picture as a whole. From this evidence the Court is able to draw an irrefutable and striking comparison as to casualties under the "long" and "short" train operations.

Considering, first, passenger-train operations, the record shows that the casualty rates in Arizona, on the train-mile or any other recognized basis, are nearly twice what they are in Nevada. The Santa Fe operations in Arizona show the same trend. Surely the ultimate test of increased hazard is to be found in the actual record of casualties covering a twenty-eight year period.

From the standpoint of the safety of persons and property, slack and slack-action casualties on passenger trains are of no significance whatever.

Long-train method of operation prevails in passenger service all over the United States, except in Arizona, and the statistics demonstrate, from the safety angle, that the fourteen-car limit has no logical or reasonable basis. Fur-

thermore, long passenger-train operations in Arizona are entirely practicable and would result in greater efficiency, economy and safety.

Hence, certainly as applied to passenger-train operations, the challenged law bears no reasonable relation to its claimed object of safety, and instead of promoting that object actually increases many hazards, and creates many others which would not exist if the law were not enforced.

In passing it might not be amiss to call attention to the splendid stride that has been made throughout the United States in recent years in reducing casualties. Arizona to a limited extent has shared in these reductions. This record shows that on the Class I roads the casualty rate for the years 1935-1939 was 10.63 per hundred million passenger miles, which is another way of saying that there was a casualty to a passenger for every 9,407,000 miles of traffic.

Considering next freight-train operations: The same careful records are kept of these operations as is required by the I. C. C. of passenger-train operations, which includes reporting all train accidents where the damage exceeds $150.00, of all train service accidents and non-train accidents resulting in casualties to persons. If an employe is injured to the extent that he is incapacitated for work for a three-day period, within ten days after the accident it is classified as a casualty and becomes reportable. If a passenger is incapacitated for one day it is reportable as a casualty. (The term casualty includes fatalities.) As a matter of fact ninety per cent of accidents resulting in fatalities to passengers or trainmen are investigated by a representative of the I. C. C., and it is rather significant that they have failed to find or report in any one year that the length of trains had anything to do with the number of casualties.

Furthermore, this record contains exhibits comparing the defendant's freight-train operations in Arizona with its operations in Nevada and New Mexico, as well as the Class I roads of America. The element of speculation as to the result of long and short-train operations, is therefore largely eliminated. From all of which it appears very definitely that there are more accidents and they occurred more frequently in proportion to trains handled or traffic

moved in short-train territory than in long-train territory. Reference is made to the findings of fact for details to support this statement.

The frequency of train and train-service accidents, which includes grade-crossing accidents, appears to be directly related to the number of train units operated and that when more train units are run than are necessary to handle a given amount of traffic, the hazard or accidents in the handling of such traffic is correspondingly increased. When one considers that in the year 1938, for instance, that 30.8% or 4,304 more freight trains were operated between Yuma and El Paso than were actually necessary if it had not been for this law, it becomes apparent why the casualty rate is higher in Arizona.

Also it is clear that the reason defendant is unable to effect improvements in the efficiency and economy of its freight-train operations in Arizona comparable to those achieved in neighboring states, or upon its system generally, is primarily due to the restrictions imposed by the Arizona law.

In arriving at a decision in this case I have not overlooked, nor minimized, the type of casualty caused by the sudden start, stop, lurch and jerk of the train or car, commonly known as slack action casualties, which are so dreaded by every trainman. While slack action cannot be prevented, it must be controlled. A certain amount of slack is absolutely necessary to train operations. It cannot be denied that the addition of each car to a train adds just that much more potential slack, which must be effectively handled by the engineer if serious accidents are to be avoided. To the credit of the locomotive engineers of the United States, be it said that they have, with the improved equipment and devices furnished them, manifested greater skill and exercised more care in handling these longer trains with their heavier locomotives to the extent that over a seventeen-year period (1923-1939) only six per cent of the over-all casualties were caused by this type of accident. It must also be remembered that there are many factors besides length of train causing slack-action casualties, such as: grades, speed of train, consist of train and whether loaded or empty. The record shows many severe casualties of

this type on short trains. Limiting trains to the Arizona maxima has had no perceptible limiting effect on even that class of accidents, but if it had, surely it would not be argued that the law was aimed at a definite class of hazards, to-wit: slack-action accidents, which represents but six per cent of the whole, and that the law must stand regardless of its effect on all the other classes of accidents representing ninety-four per cent of the casualties, all of which showed material increase due to the effect of the law.

Essentially then the question is not whether a given number of long trains may be operated with fewer casualties than an equal number of short trains, but rather whether the long-train method of moving the entire volume of traffic results in fewer casualties, of all classes, than the movement of the traffic in a larger number of trains of restricted length.

In determining then whether the law bears any reasonable relation to safety, only the over-all result in casualties of the entire operation should be considered and when thus weighed it is clear that the law not only does not increase safety of train operations in Arizona, but that as a matter of cold fact it makes these short-train operations more dangerous.

Thus the Arizona Train-Limit Law not only bears no reasonable relation to safety but, to the contrary, does, and if enforced will continue to, impair and lessen substantially the safety of defendant's train operations in Arizona and the adjacent affected territory.

Defendant established that if the law were invalidated it contemplated the undertaking of an immediate program to build or extend its sidings and yard tracks at forty-nine different stations so as to provide suitable trackage permitting the efficient operation of long trains. Furthermore, larger locomotives of the AC-8 type, having much greater tractive power, would be assigned to the Tucson division. This change in motive power would also necessitate reconstructing certain roundhouses and turntables and providing additional repair facilities. It was estimated that these changes would involve the expenditure of more than a million dollars.

Before closing this opinion, may I say that the arduous task of the Court has been made much easier by the very able and comprehensive manner in which the Attorneys for both of the parties have briefed both the law and the facts; I compliment each of you on the skill manifested. This assistance has been appreciated, as has all of the courtesies which were extended throughout the long trial.

At the close of the trial both parties requested the Court to make findings of fact and conclusions of law. Thereupon the Court asked that counsel for the parties submit proposed findings, which request in due time was complied with. Being now of the opinion that the findings of fact submitted by the defendant, consisting of some 200 printed pages, are well supported by the record, the Court therefore adopts in toto these findings of fact and conclusions of law as its own. These have been signed and are now filed with the Clerk as a compliance with Section 21-1027, A. C. A., 1939.

It necessarily follows from what has been said that the Court considers the Train-Limit Law as being wholly void, invalid and unenforceable as to the interstate operations of the defendant, by reason of being in conflict with the Commerce Clause and the Due Process Clause (Fourteenth Amendment) of the Constitution of the United States, as well as the Due Process Clause of the Constitution of the State of Arizona. The Defendant is, therefore, entitled to judgment dismissing the Plaintiff's Complaint, and each count thereof, and for its costs of suit herein expended. IT IS SO ORDERED.

Done in open Court this 11th day of February, 1942.

LEVI S. UDALL,
Presiding Judge in the Above Entitled Case.

APPENDIX C.

December 23, 1943.

IN THE SUPREME COURT OF THE STATE OF ARIZONA.

No. 4525

STATE OF ARIZONA ex Rel. JOE CONWAY, Attorney General of the State of Arizona, *Appellant*,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, *Appellee*.

Appeal from the Superior Court of Pima County. Honorable Levi S. Udall, Judge. Judgment Reversed.

Joe Conway, Attorney General; Earl Anderson, Assistant Attorney General; Charles L. Strouss, of Counsel, all of Phoenix, Arizona, Attorneys for Appellant.

Cleon T. Knapp, James P. Boyle, B. G. Thompson, all of Tucson, Arizona; Henley C. Booth, Burton Mason, both of San Francisco, California, Attorneys for Appellee.

STANFORD, *J.*:

This action is brought under the provisions of Section 69-119, Arizona Code Annotated, 1939, (Laws, 1913, Referendum, p. 15; Sections 2166-2168, Revised Statutes of Arizona, 1913; Civil Code; Section 647 Revised Code of Arizona, 1928), being the act commonly called the Train Limit Law, and was brought for the purpose of recovering from defendant penalties as provided by the act. The charge in the complaint is that on March 12, 1940, the defendant operated a passenger train of more than 14 cars, and on April 4, 1940, the defendant operated a freight train of more than 70 cars, in violation of said law.

The aforesaid statute reads as follows:

> "Section 1. It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the state of Arizona, to run, or permit to be

run, over his, their, or its line of road, or any portion thereof, any train consisting of more than seventy freight, or other cars, exclusive of caboose.

"Section 2. It shall be unlawful for any person, firm, association, company or corporation, operating any railroad in the state of Arizona, to run, or permit to be run, over his, their, or its line or road, or any portion thereof, any passenger train consisting of more than fourteen cars.

"Section 3. Any person, firm, association, company or corporation, operating any railroad in the state of Arizona, who shall wilfully violate any of the provisions of this act, shall be liable to the state of Arizona for a penalty of not less than one hundred dollars, nor more than one thousand dollars, for each offense; and such penalty shall be recovered and suits therefor brought by the attorney general, or under his direction, in the name of the state of Arizona, in any county through which such railway may be run or operated; provided, however, that this act shall not apply in cases of engine failures between terminals.

"Section 4. All acts and parts of acts in conflict with the provisions of this act are hereby repealed."

The case was tried in Tucson, Pima County, Arizona, before the Honorable Levi S. Udall, Judge of the Superior Court of Apache County, Arizona, to whom it had been assigned.

By the judgment rendered it was held that the Train Limit Law of Arizona, as set forth in the sections above quoted, was unconstitutional and void because:

"First: Said statute invades the exclusive legislative field of Congress, as limited and defined by the Commerce Clause (par. 3, of Sec. 8, Art. 1) of the Constitution of the United States;

"Second: Said statute imposes direct, unreasonable and unlawful burdens upon, and interferes with, delays and obstructs interstate commerce, in violation of said Commerce Clause;

"Third: Said statute impairs the use and usefulness of the transportation facilities employed by defendant as a common carrier engaged in interstate commerce;

"Fourth: Said statute is in conflict with and infringes upon, and amounts to an unlawful attempt to supplement, the power-brake provisions of the Federal Safety Appliance Acts, and the safety-device provisions of Section 25 of the Interstate Commerce Act, which Federal statutes operate upon the same subject matter and are directed to the same objects as said Train-Limit Law and by which said statutes Congress has completely and exclusively occupied the field of regulation of train lengths;

"Fifth: Said statute operates unreasonably and arbitrarily to deprive defendant of its property, without due process of law, in violation of both the Due-Process Clause of the Fourteenth Amendment to the Constitution of the United States, and the Due-Process Clause set forth in Section 4 of Article 2 of the Constitution of the State of Arizona:"

Appellee has admitted the operation of the trains as alleged in the complaint, but alleged that each of said trains consisted in a large part of cars moving in Interstate Commerce and carrying interstate traffic, and in further explanation of appellee's case, we quote as follows:

"* * * and denied that either of said operations was a wilful violation of the law. For a further separate and affirmative defense to the complaint, appellee alleged that the law was and is void, invalid and unconstitutional, because in violation of the Commerce Clause (Article I, Section 8, para. 3) of the Constitution of the United States, the Due-Process Clause of Section 1 of the 14th Amendment of the Constitution of the United States, and the corresponding Due-Process Clause set forth in Article II, Section 4, of the Constitution of Arizona, in that: (a) the law undertakes to regulate a subject-matter of national concern which, if required to be regulated at all, is subject to regulation

only by Congress pursuant to the powers granted by the Commerce Clause; (b) the necessary effect of the law is to regulate appellee's train operations extra-territorially, that is to say, beyond the boundaries of Arizona; (c) the law directly and substantially interferes with, delays, and regulates appellee's interstate train operations in Arizona and the adjacent states; (d) the law imposes direct and substantial burdens upon the appellee's interstate train operations; (e) the law, to the extent that it has, or is intended or claimed to have, the effect of limiting the number of cars in a train to that number which can be safely and effectively controlled or stopped by the use of air brakes and other appurtenances now in use on such trains, is in conflict with and an infringement upon existing Federal legislation having the same or similar purposes, enacted by Congress pursuant to its powers under the Commerce Clause; (f) the law deprives appellee of its property unreasonably and arbitrarily, in violation of the due-process clauses of the State and Federal Constitutions above referred to, for the reason, among others, that it bears no reasonable relation to health or safety, its ostensible objects and does not eliminate or reduce any present hazard, but on the contrary creates certain hazards which would not otherwise exist, and increases other hazards of railroad operation in numerous respects."

In 1912, the year Arizona became a state, several measures were referred, under the Constitutional Act of Initiative and Referendum, to the people after their passage by the legislature. Among those measures, besides the one in question, the Train Limit Law, each had to do with the regulation through the police power of the state of railroads in Arizona for the health and safety of its employees and traveling public. That will be observed, first, by the act regulating the number of men to be employed on trains and engines; second, by the act regulating head lights on all locomotives (for example, in this particular act, it was required that locomotive engines used in the transportation

of trains over railroads should install electric head lights of a certain power); and third, by the act to require certain tests of service before a person could serve as a locomotive engineer or train conductor. It can be easily seen that all of these acts, including the one in question in this action, were made the laws of this state for the purpose of the safety and protection of employees and of the people being transported over the railroads in our state.

Appellee contends in its brief, as it did by a statement before the court in argument that "it is much more probable that the law was advocated and passed as a measure to promote and preserve—make static—the employment of railroad trainmen. Certainly that is its most obvious practical (but extra-legal) purpose and, as experience has shown, one of its principal results." We have just quoted the title to other acts, as well as this one, enacted in the year 1912 by the State Legislature. All of them have to do with the regulation of the handling of trains in order to protect the employees or traveling public as will be seen by the various acts, and no other reason could possibly be assigned to those acts, including, as stated, the one in question here. The case of *State* vs. *Pate*, (N. M.), 138 Pac. (2d) 1006, states: "The courts do not inquire into the motives of the legislature."

16 C. J. S. page 277, Sec. 100, has the following to say in connection with legislative acts:

> "It will be presumed that the legislature, in passing a statute, acted advisedly and with full knowledge of existing facts and conditions on which its legislation is based, and that no general laws are ever passed either through want of information on the part of the legislature or because it was misled by false representations of interested parties. It will also be presumed that the legislature carefully investigated and properly determined that the interests of the public required the enactment of particular legislation. So, the court will presume that the legislature in enacting a regulatory measure had adequate knowledge of the evils sought to be corrected and did not act arbitrarily or unreasonably."

In State vs. Wisconsin Telephone Co., 172 N. W. 225, 169 Wis. 198, it is said:

> "The term 'police power' is very elastic and is used to express different meanings at different times. In its broadest sense, it has been said to include 'all legislation and almost every function of civil government.'"

The case of Salem Lodge vs. Swaile, 197 N. W. 837, 209 Ind. 347, expresses the opinion that when a subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts, but for the legislature which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome.

In the case of State vs. Superior Court, 174 Pac. 973, 103 Wash. 409, it is stated:

> "Indeed, it may be said that, where the police power is set in motion in its proper sphere, the courts have no jurisdiction to stay the arm of the legislative branch of the government, for it is operating in its own particular field, where even the courts are powerless to insist upon a procedure consistent with the forms of the common law."

Dwelling for the present on the contention of the appellee that the law is in conflict with the Fourteenth Amendment, we refer to the case of Barbier vs. Connelly, 113 U. S. 923, reading as follows:

> . . . . But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the State, sometimes termed its 'police power,' to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and ir-

rigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one then upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment."

Appellee has brought to the attenion of the court six certain cases in which it places great reliance. The first one is the case of A. T. & S. F. Ry. Co., et al., vs. LaPrade (1933) 2 Fed. Supp. 855. This case was tried by one Circuit Judge and two District Judges. In this case counsel in their brief have to say:

"The conclusions expressed by that opinion were given no effect solely because of the holding of the United States Supreme Court in Ex parte LaPrade (1933), 289 U. S. 444; 77 L. Ed. 1311, which decided that the suit had abated because of the substitution of the incoming attorney general for the original defendant. The Supreme Court considered no other question."

The second is the Southern Pacific Company vs. Mashburn, (1937), 18 Fed. Supp. 393. This case was tried before one Circuit Judge and two District Judges. That case was decided against the validity of the Nevada law which was patterned after the Arizona law.

The third case was Texas & New Orleans R. Co. vs. Martin, et al. (1936). This is known as the Louisiana case

and was heard by one Circuit Judge and two District Judges. It is an unreported case but the court made permanent the interlocutory injunctions issued prohibiting interference of the railroad in that state.

The fourth case is the case of M. K. & T. R. Co. vs. Williamson, 36 Fed. Supp. 607, known as the Oklahoma case. That case is like the Nevada Train Limit case except that it has reference to freight trains only. This case was heard and decided by the two Circuit Judges, District Judge Vaught dissenting.

The fifth case is State, etc. vs. A. T. & S. F. Ry. Co. et al., 125 Kans. 586; 264 Pac. 1056, a Kansas case heard by the State Supreme Court. The state, through its Public Service Commission, attempted to compel, by mandamus proceedings, the railroad company to put into effect certain orders prescribed by its relating to manual signals to be used by train crews and relating to the air and power brake system, and in part, the holding of that state court was that such an order could not be enforced by mandamus where no showing was made that a better system had been devised. The unanimous judgment was rendered for the railroad company.

The sixth case is Southern Pacific Company vs. Railroad Commission of California, 10 Fed. Supp. 918. In that case the Railroad Commission of California had ordered that certain trains moving between certain points during the six winter months be operated with an additional caboose, to be placed midway in the train. The opinion in this case was given by one Circuit and two District Judges upholding the railroad company.

In connection with the foregoing six cases we quote a statement, or contention, of the appellee herein as follows:

> "It will be noted that the four Federal train-limit cases were heard before twelve different Federal judges, five of whom were Circuit judges and seven District judges. Three of the Circuit judges and all of the District judges, or ten Federal judges in all, have agreed that state train-limit laws exactly or essentially similar to the challenged law are invalid, upon precisely the same constitutional grounds urged in the present

case. Only two of these twelve judges have taken a contrary view.

"Three of the ten Federal judges mentioned have also concurred in reaching the same result with respect to a state regulation not differing in principle from a train-limit law; although, of course, neither the volume of the traffic affected, the character and extent of the interference imposed, nor the financial burden was as severe and widespread as in the train-limit cases."

The State of Oklahoma, one of our latest additions to statehood in the union, no doubt was desirous of enacting laws that would be progressive, that would be for the safety of the traveling public through its state and for the employees on its trains. Regardless of the reasoning of the appellee herein, as above set forth, as to the total number of various judges who have in the aggregate given opinions that would overwhelm the Oklahoma case, nevertheless the Oklahoma case was not tried by state judges and it is the latest case quoted by appellee herein, and while this court is not bound to follow, it is certainly most fitting to do so.

There are something like 325 cases cited by the two parties to this action, and it would be impossible to make reference to all of them. The case of M. K. & T. R. Co. vs. Williamson, supra, is replete with the cases cited by both sides in this case, and Circuit Judge Bratton, who wrote the opinion in that case, gave expression of the court to most all the cases cited in the case. In that case, like the one at bar, the railroad company was compelled, among other things, to expend great sums of money in order to comply with the restrictions placed by the State of Oklahoma, and by injunction the railroad company sought to be relieved of the necessity of such great additional expense. We quote from said case as follows:

"It is contended with emphasis that the statute, applied to the business of plaintiff, is not a safety measure reasonably enacted in the exertion of the police power of the state, but is merely an attempt to regulate, delay and burden interstate commerce, in violation of the

Commerce Clause. The supreme, plenary and complete power of Congress to regulate interstate commerce is without limitation or restriction, except that prescribed in the Constitution; and within the reach of that paramount authority lies the power to protect such commerce against substantial dangers, burdens or obstructions, no matter the source from which the encroachment springs. Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23; Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 3252, 398, 33 S. Ct. 729, (citing many other cases). Coming to apply the well-recognized doctrine many state and municipal enactments have been held invalid (citing cases).

"But every state statute having some relation to interstate commerce is not to be condemned on that ground. A state is free in the exertion of its police power to enact reasonable measures in the interest of the health, safety and welfare of its people, including employees of railroads, passengers on trains, and others, even though interstate commerce may be incidentally or indirectly involved. * * * It is crystal clear that the general principle running through all of these cases is that a state statute, enacted in the exercise of the police power, and bearing some reasonable relation to the health, safety, or well-being of the people of the state, is not to be overturned by judicial decree, even though by its necessary operation it affects interstate commerce in an incidental or indirect manner, but not otherwise. * * *.

"Plaintiff relies upon the due process clause of the Fourteenth Amendment. It is obvious that to comply with the statute plaintiff will be required to expend additional sums in the operation of its business. The cost of compliance with a statute of this kind is an element for appropriate consideration in determining whether the statute is arbitrary, capricious, or repugnant to due process; but, standing alone, it is not always enough to warrant judicial determination of invalidity. Missouri Pacific Railway Co. v. Kansas, 216 U. S. 262, 30 S. Ct. 330, 54 L. Ed. 472; Lehigh Valley Railroad Co. v. Board of Public Utility Commis-

sioners, 278 U. S. 24, 49, S. Ct. 69, 73 L. Ed. 161, 62 A. L. R. 805; Missouri Pacific Railroad Co. v. Norwood, supra. The facts presented are not sufficient to distinguish or set apart this case from those to which reference has been made in which statutes enacted in the exercise of the police power of the state were sustained, although interstate commerce was incidentally and indirectly affected and the expenditure of additional sums was necessitated.

"The remaining contention to be considered is that the statute must fall because Congress has occupied the field; that the act infringes and is in conflict with legislation heretofore enacted by Congress pursuant to its powers under the Commerce Clause. To sustain the contention, plaintiff relies upon paragraphs 10 to 17 and paragraph 21 of section 1 and section 26, of the Interstate Commerce Act, as amended, 49 U. S. C. A. Pars. 1, 26; and sections 1 and 9 of the Safety Appliance Act, as amended, 45 U. S. C. A. Pars. 1, 9. Paragraph 10, section 1, of the Interstate Commerce Act, as amended, defines the term 'car service'; paragraph 11 makes it the duty of a railroad company to furnish safe and adequate car service, and to enforce just and reasonable rules, regulations, and practices in respect of car service; paragraph 12 relates to the distribution of cars for the transportation of coal; paragraph 13 authorizes the Commission to require railroads to file with it their rules and regulations relating to car service, and empowers the Commission to direct that such rules and regulations be incorporated in the schedules showing rates, fares and charges for transportation; paragraph 14 authorizes the Commission to establish rules, regulations, and practices touching car service; paragraph 15 is addressed to the furnishing of car service and the use of facilities in case of shortage of equipment, congestion of traffic, or other emergency; paragraph 16 empowers the Commission to make just and reasonable directions in respect to the handling, routing, and movement of traffic over other lines; paragraph 17 requires railroad companies to obey orders of the Commission concerning car service, and

provides a penalty for disobedience; and paragraph 21 vests in the Commission authority to reqire any railroad to provide itself with safe and adequate facilities for performing its car service, and fixes a penalty for refusal or neglect to comply with such an order; and section 26 authorizes the Commission to order a railroad to install automatic train-stop or train-control devices or other safety devices, and fixes a penalty for the refusal or neglect to comply with such an order. Section 1 of the Safety Appliance Act, as amended, provides that no railroad company shall use on its line any locomotive in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, and that no train shall be run in such traffic that does not have a sufficient number of cars in it equipped with such power and train brakes that the engineer on the locomotive can control its speed without requiring brakemen to use the common hand brake for that purpose; and section 9 provides that whenever a train is operated with power or train brakes not less than fifty per cent of the cars shall have their brakes used and operated by the engineer, that all power-braked cars in the train which are associated together with such fifty per cent shall have their brakes so used and operated that the Interstate Commerce Commission may, from time to time, increase the minimum percentage of cars required to be operated with power or train brakes, and that failure to comply with any such requirement shall subject the company to a penalty.

"In respect to the regulatory power of the state and the occasions for its exercise, the general subject of commerce has been divided into three separate and distinct classes. They are those in which the power of the state is exclusive, those in which the state may act in the absence of legislation by Congress, and those in which the action of Congress is exclusive and therefore the state cannot act at all (citing cases). The reasonable limitation of the length of trains in the interest of public safety falls within the second class. As to that class, the exercise of the paramount power of Congress

is necessary to take from the state its subordinate power to legislate. Covington & Cincinnati Bridge Co. v. Kentucky, supra; Western Union Telegraph Co. v. James, supra. And mere congressional delegation of power to the Interstate Commerce Commission to act in respect to that class does not require the state to yield. It is only after action by the Commission that the state is shorn of its power (citing cases). But the intent of Congress to exert its superior authority and thus exclude or supersede state legislation concerning the same matter is not to be lightly inferred. It must be fairly manifested (citing cases). And, it is within the power of Congress to limit its regulation to only part of a given field, thus leaving the remainder open to action by the state (citing cases).

"The acts of Congress relied upon fail to make specific reference to the length of trains as an element of safety, and it is not contended that the Interstate Commerce Commission has acted or asserted its authority to act in respect of the matter under the powers which Congress has delegated to it. True, some if not all of the statutes concern themselves with various aspects of safety in the operation of trains. But, fairly construed, they do not contain any provision from which it can be reasonably implied that Congress intended to exert the paramount character of its authority in relation to the length of trains in such manner as to exclude or supersede state action. And until an intent to exercise such superior authority has been indicated, the state is free to legislate in the exertion of its police power . . . ."

It has come to our attention that the Interstate Commerce Commission in relation to the Transportation Act of 1940 has recently commented on that Act as follows:

"It is unnecessary to decide whether Congress has occupied the field of safety regulation with respect to the operation of trains or with respect to the length of trains. In any event, that is a question for the courts. The question before us is whether, in view of the

emergency found to exist, we were authorized by law to suspend the operation of State laws limiting the number of cars in a train."

The emergency referred to, of course, has reference to the suspension of the Train Limit Law for the duration of the war, and to which this state has unhesitatingly yielded. From the case of People vs. Letford, 79 Pac. (2d) 274, 102 Colo. 284, we quote the following:

"In approaching the question of the validity and constitutionality of the statute, it is well to keep in mind certain fundamental rules. When an act of the Legislature is attacked on the ground of unconstitutionality, the question presented is not whether it may be voided but whether it is possible to uphold it. Denver v. Knowles, 17 Colo. 204, 30 P. 1041, 17 L. R. A. 135. Every presumption will be indulged in favor of the legislation and only clear and demonstrable usurpation of power will authorize judicial interference with legislative action. Green v. Frazier, 253 U. S. 233, 40 S. Ct. 499, 64 L. Ed. 878. The rule was well stated by the Supreme Court of Massachusetts in Re Wellington et al., Petitioners, 16 Pick. 87, 26 Am. Dec. 631, and quoted with approval by us in Milheim v. Moffat Tunnel District 72 Colo. 268, 273, 211 P. 649, 651, as follows: 'When called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give it the force of law, courts will approach the question with great caution, examine it in every possible aspect and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt.'"

The trial court took from the 19th day of November to the first of the following May in the trial of this cause, excepting some recesses. There were 886 assignments of error and 39 propositions of law presented to us, and of the many scores of cases cited by both appellant and appellee, this court has read as many as possible to be consistent in

rendering justice to both sides. The matter has engrossed the attention of this court, as time would permit, since its presentation in April, 1943, until this time, but the opinion, condensed as it is in the foregoing pages, expresses our reason for holding that the findings and judgment of the trial court to the effect that the Train Limit Law is unconstitutional were in error.

We cannot impugn the motives of the legislature of our state, and in this particular case the purpose of the citizenry of our commonwealth by disturbing the enactment of this law made by them until we find that it is in violation of a law to which the state must yield.

The judgment is reversed.

R. C. STANFORD,
Judge.

Concurring:
A. G. MCALISTER,
Chief Justice.

ROSS, J.:

I dissent. My reasons will be given later. Illness prevents my doing so at this time.

I think the judgment of the lower court should be affirmed.

HENRY D. ROSS,
Judge.

APPENDIX D.

IN THE SUPREME COURT OF THE STATE OF ARIZONA.

To the Honorable the Superior Court of the State of Arizona in and for the County of Pima. (SEAL.)

GREETING:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Pima, before you in a cause between State of Arizona, ex rel. Joe Conway, Attorney General of the State of Arizona, Plaintiff, vs. Southern Pacific Company, a corporation, Defendant, No. 20087, the

said Superior Court made and entered its judgment on February 11, 1942, as follows:

"Now, Therefore, It Is Hereby Ordered, Adjudged And Decreed:

(a) That said Train-Limit Law is wholly void, invalid and unenforceable, as to said defendant, and each and all of its trains carrying any interstate commerce or traffic, or engaged in interstate transportation, upon each and all of the grounds hereinbefore set forth;

(b) That defendant is not liable to plaintiff by reason of any of the matters or circumstances alleged in the complaint herein, or otherwise, either for the sums demanded as penalties in said complaint, or for any other sum or amount whatever;

(c) That plaintiff take nothing by its action;

(d) That defendant do have and recover from plaintiff its costs of suit herein, in the sum of $_____.

Dated: This 11th day of February, 1942.

LEVI S. UDALL,
Judge of the Superior Court of the State of Arizona."

as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by plaintiff agreeably to the law in such case made and provided fully and at large appears.

And Whereas, in April, in the year of our Lord one thousand nine hundred and forty-three, the said cause came on to be heard before the said Supreme Court and was submitted for decision after argument of counsel.

On Consideration Whereof, it was on the 23rd day of December in the year of our Lord one thousand nine hundred and forty-three, ordered by this Court that the judgment of the said Superior Court in this cause, entered February 11, 1942, be, and the same is hereby reversed. Costs in this court to said appellant State of Arizona of and from said appellee Southern Pacific Company on cost bill duly filed and allowed.

WHEREUPON, appellee filed its motion for rehearing, on consideration of which, with the reply and objections of appellant, it was, on January 13, 1944, Ordered that the motion for rehearing be denied.

You therefore are hereby commanded that such proceedings be had in said cause, as according to right and justice, and to law, ought to be had, the said appeal notwithstanding.

Witness, the Honorable A. G. McAlister, Chief Justice of the Supreme Court of the State of Arizona, the Fourteenth day of January, in the year of our Lord one thousand nine hundred and Forty-four.

Costs of No cost bill filed.

EUGENIA DAVIS,
Clerk of the Supreme Court
of the State of Arizona.

[Endorsed:] No. 4525. Supreme Court of the State of Arizona. State of Arizona ex Rel. Joe Conway, Attorney General of the State of Arizona, Appellant, vs. Southern Pacific Company, a Corporation, Appellee. Mandate. Issued January 14, 1944.

APPENDIX E.

Jan. 13, 1944.

IN THE SUPREME COURT OF THE STATE OF ARIZONA.

No. 4523.

STATE OF ARIZONA ex Rel. JOE CONWAY, Attorney General of the State of Arizona, *Appellant*,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, *Appellee*.

Appeal from the Superior Court of Pima County. Honorable Levi S. Udall, Judge. Judgment Reversed in Opinion of December 23, 1943.

Joe Conway, Attorney General; Earl Anderson, Assistant Attorney General; Charles L. Strouss, of Counsel, all of Phoenix, Arizona, Attorneys for Appellant.

Cleon T. Knapp, James P. Boyle, B. G. Thompson, all of Tucson, Arizona; Henley C. Booth, Burton Mason, both of San Francisco, California, Attorneys for Appellee.

Ross, J. (Dissenting):

When the opinion in this case was handed down on December 23, 1943, I was unable, because of illness, to give my reasons for dissenting. I now do so.

The validity of the Arizona Train Limit Law (section 69-119, Arizona Code 1939) as applied to interstate transportation of persons and property is the question for decision. Such law undertakes to penalize any railroad in the State of Arizona that runs over its lines, or any part thereof, any train consisting of more than 70 freight, or other cars, exclusive of caboose, or any passenger train of more than 14 cars.

The act is silent as to its purpose. If it was enacted to protect the safety, health and well-being of railroad employees, or the traveling public, it does not so recite, as in

the Williamson case (36 Fed. Supp. 607) cited in the majority opinion.

The law's observance until now by the interstate railroads operating in Arizona, as the evidence and findings conclusively show, has not only cost such utilities large sums of money, but, also, has delayed and interfered with their business of transportation of goods and persons, at both the east and west boundaries of the state, without any material benefit to the traveling public, in the way of safety or health, or of the employees unless it be that more of them thereby have secured employment, increasing the operating expenses of the roads.

One sure result of a compliance with the law has been to force interstate companies to operate many more trains in the conduct of their business than the safety and well-being of the employees would seem to require, greatly increasing their costs.

Under the law, a fruit or cattle train made up in California for the Kansas City or Chicago Markets, if it consists of more than 70 cars, must, when or before it reaches, Yuma, Arizona, be broken down to the limit of 70 cars before it proceeds through Arizona. When this same train has crossed Arizona it may be rebuilt to the California length and proceed on its course to the point of destination. The traffic from the east to California must also conform to this arbitrary rule at the state's boundary. In effect, the law limits length of trains from California and New Mexico to and through Arizona and practically outside of the state.

The regulation of the length of interstate trains, if permissible, is by reason of the state's right under the constitution to pass laws for the profection of its people's lives, safety, health and well-being and to do that the state may enter the field appropriated under the federal constitution to the federal government, when such field has not been wholly occupied by that government. Powers belonging under the constitution to the federal government but not exercised may in all proper cases be exercised by the state for its use and protection, and a state law to that end will be valid and enforceable.

The Train Limit Law, if an allowable state regulation originally, is no longer allowable for the following reasons:

1. The danger to life and health in the operation of long trains, because of the improvement in the operating services as shown by the evidence and findings, has been greatly minimized, if not wholly done away with.

2. That because of such improvement, if the Train Limit Law was ever a valid police regulation, it now, under the evidence, serves but one purpose, to wit, the employment of more employees and trains, with the expense and hazards incident thereto.

3. It invades the field of regulation occupied by the Congress in its legislation providing for safety appliances in railroad operations (Virginian Ry. Co. v. United States (1915), 223 Fed. 748) and the safety provisions of the Interstate Commerce Act.

3. In Ex Parte No. 156, November 8, 1943, the Interstate Commerce Commission refused to modify its Service Order No. 85, theretofore entered, suspending during the war the operation of state laws limiting the number of cars in trains, stating, among other things:

> "If state laws limiting the number of cars in trains are to be held valid (a question we do not decide), it would be possible for each state to set a different number of cars as the maximum to be hauled in a train. State might even limit the length of trains to one car, although such a law would be clearly arbitrary and unreasonable. Higher limits might be set by states and found reasonable, but lack of uniformity would place a serious burden on interstate commerce. * * *
>
> "The fact that freight trains in excess of 70 cars and passenger trains in excess of 14 cars are safely operated in states without train-limit laws 'is convincing evidence of its safety, except where unusual operating conditions exist.' * * *
>
> "We find that these state laws were and are in fact rules and regulations with respect to car service within

the meaning of section 1, paragraph (10) and (15); that Service Order No. 85 was and is in accord with the national transportation policy * * * and is fully authorized by section 1 * * * of the Interstate Commerce Act.''

The Interstate Commerce Commission refused to modify or change said Service Order No. 85 for the reasons (a) that it was a valid order made pursuant to act of Congress and (b) because as a matter of fact ''freight trains in excess of 70 cars and passenger trains in excess of 14 cars are safely operated in states without train-limit laws'', which '' 'is convincing evidence of its safety, except where unusual operating conditions exist.' '' This finding of fact by the Commerce Commission is fully and well supported by the evidence taken in this case and is in accord with the learned trial court's findings.

Four states, Arizona, Nevada, Louisiana and Oklahoma, have enacted train limit laws. The laws in the first three named states have been passed upon and declared to be invalid (Atchison, T. & S. F. Ry. Co. *v.* La Prade, 2 Fed. Supp. 855; Southern Pacific Co. *v.* Mashburn, 18 Fed. Supp. 393; Texas & New Orleans R. Co. *v.* Martin et al. (1936, unreported), No. 428 Equity), in Oklahoma it was sustained by a divided court (Missouri-Kansas-Texas R. Co. *v.* Williamson, 36 Fed. Supp. 607). The rulings of these courts is another very cogent reason why the Train Limit Law should not be sustained. These decisions were by three-judge federal courts and were unanimous in holding the law invalid, except in the state of Oklahoma. In other words, of the 12 judges presiding in these cases 10 joined in declaring the law invalid and two (in the Oklahoma case) sustained the law.

I think the judgment of the lower court should be affirmed.

HENRY D. ROSS,
Judge.

APPENDIX F.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA.

No. 20087.

STATE OF ARIZONA, ex rel. JOE CONWAY, Attorney General of the State of Arizona, *Plaintiff*,

vs.

SOUTHERN PACIFIC COMPANY, a corporation, *Defendant*.

Judgment On Mandate of Supreme Court.

The above entitled cause coming on regularly before the Court this 5th day of February, 1944, on the opinion and mandate of the Supreme Court of the State of Arizona,

It Is Now Ordered, Adjudged And Decreed:

1. That the Arizona Train Limit Law is constitutional and valid.

2. That plaintiff have and recover judgment against the defendant:

(a) on plaintiff's first cause of action, in the amount of $250.00;

(b) on plaintiff's second cause of action, in the amount of $250.00;

(c) for plaintiff's costs herein in the amount of $_____.

Dated this 5th day of February, 1944.

(S.) LEVI S. UDALL,
Judge.